IN THE

SUPREME COURT OF THE UNITED STATES

No. 508 October Term 1963

ANDRES LUCAS and ARCHIE L. LISCO, individually and as citizens of the State of Colorado, taxpayers and electors therein, for themselves and for all other persons similarly situated,

Appellants,

—vs—

THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF COLORADO, JOHN LOVE, AS GOVERNOR OF THE STATE OF COLORADO, HOMER BEDFORD AS TREASURER OF THE STATE OF COLORADO, AND BYRON ANDERSON AS SECRETARY OF STATE OF THE STATE OF COLORADO, EDWIN C. JOHNSON, JOHN C. VIVIAN, JOSEPH F. LITTLE, WARWICK DOWNING and WILBUR M. ALTER,

Appellees.

MOTION TO DISMISS OR AFFIRM

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Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States move that the appeal be dismissed or, in the alternative, that the judgment of the court below dismissing complaints attacking the apportionment of the membership of the Colorado legislature be affirmed.

QUESTIONS PRESENTED

1. Should the Supreme Court accept jurisdiction in an appeal from a determination by the Court below that a Colorado Constitutional Amendment providing for the ap-

portionment of two houses of the legislature does not violate the equal protection clause when:

(a) the state method of apportionment results from a state constitutional amendment arising from initiative and referendum wherein the vote of each voter is given equal weight; and the apportionment amendment was adopted at the general election of November, 1962;

(b) the state constitutional right to initiative and referendum is a frequently exercised remedy available to the electorate;

(c) the apportionment prescribed by the people carried, not only in the state as a whole, but in every county thereof—urban as well as rural;

(d) at the same time the electorate of the state as a whole and in every county thereof rejected another initiated amendment which would have apportioned both houses on a strict census basis;

(e) the method prescribed by the electorate apportions the lower house of the state legislature on a strict population basis and apportions the upper house on both a population basis and geographical basis, but the method does not result in the control of either house by a minority of the populace; and

(f) the essential sole basis of the appeal is that any method of apportionment which is not based upon a strict census of the population is *per se* invidiously discriminatory and violative of the equal protection clause of the Fourteenth Amendment.

2. Is there a violation of the equal protection clause of the Fourteenth Amendment where the lower house of

a bicameral state legislature is composed of members elected from districts apportioned on a strict population basis and the upper house is composed of members elected from senatorial districts varying in population but established by state constitutional amendment, initiated by the people in 1962 and carried at referendum in the state as a whole and in every county of the state, when the basis of the apportionment in the Senate gives rational consideration to both population and the state's heterogeneous, economic and geographical characteristics?

STATEMENT

This is a direct appeal from the final judgment entered July 10, 1963 by a District Court of three judges convened pursuant to 22 U.S.C. Sec. 2281. Page references made herein are to Appellants' Jursdictional Statement and Appendices.

There were two proceedings in the court below. The first concluded on August 10, 1962 when the court held that there had been *prima facie* established a case of invidious discrimination. However, the court noted an initiated constitutional amendment on the ballot for the ensuing general election and continued the case until after such election. There were two such amendments submitted to the electorate. Amendment No. 7 (the basis for the complaint of appellants) was adopted, and Amendment No. 8 was rejected in the state as a whole and in each county thereof. The rejected Amendment No. 8 proposed to apportion both houses of the bicameral Legislature strictly on a population basis.

Subsequent to the referendum and the approval of Amendment No. 7, further pleadings were filed with the court below and the issue was joined on the constitutionality

of Amendment No. 7. The court below (p. 50) properly describes Amendment No. 7 as follows:

> "Amendment No. 7 created a General Assembly composed of a Senate of 39 members and a House of Representatives of 65 members The state is divided into 65 representative districts 'which shall be as nearly equal in population as may be' with one representative to be elected from each district. The state is also divided into 39 senatorial districts, 14 of which include more than one county. In counties apportioned more than one senator, senatorial districts are provided which 'shall be as nearly equal in population as may be.' Mandatory provisions require the revision of representative districts and of senatorial districts within counties apportioned more than one senator after each Federal Census."

As the court below noted, the case as presented to it subsequent to the approval of Amendment No. 7 did not present the issues as they existed prior to the apportionment made by Amendment No. 7.

The court found that Colorado is "an economically or geographically heterogeneous unit," and that the topography of the state is the most significant contributor to the diversity. The court then went on in detail (pp. 58-61 inclusive) to point out that the state is composed of high plains on the east and high mountains on the west with various river drainages; that there are transportation difficulties of varying severity; that the availability of water supply has caused conflicts over the use of water and has been a source of trouble to the state since its admission to the Union; and that the population is concentrated heavily along the eastern edge of the foothills in the Rocky Mountains in a relatively narrow strip. Upon the basis of the specifics, the court stated (pp. 65, 66):

"The heterogeneous characteristics of Colorado justify geographic districting for the election of the members of one chamber of the legislature. In no other way may representation be afforded to insular minorities. Without such districting the metropolitan areas could, theoretically, and no doubt practically, dominate both chambers of the legislature.

"The plaintiffs make much of the disparities in senatorial representation which vary downward from 3.6 to 1. They say that the deviations from per capita standards are impermissible. We do not agree. The distributive scheme of Amendment No. 7 may not be perfect but it does recognize the geographic diversities, the historic grouping of counties, and the accessibility of a candidate to the voters and of a senator to his constituents. The realities of topographic conditions with their resulting effect on population may not be ignored. For an example, if the contention of the plaintiffs was to be accepted, Colorado would have one senator for approximately every 45,000 persons. Two contiguous Western Region senatorial districts, Nos. 29 and 37, have a combined population of 51,675 persons inhabiting an area of 20,514 square miles. The division of this area into two districts does not offend any constitutional provisions. Rather, it is a wise recognition of the practicalities of life. An analysis of the other senatorial districts in all the regions except the populous East Slope would merely emphasize the point."

Appellees Edwin C. Johnson, John C. Vivian, Joseph F. Little, Warwick Downing, and Wilbur M. Alter were allowed to intervene in the proceedings in the court below as parties, their interests not coinciding with those of the other appellees, and they have filed a motion herein, to which appellants and the other appellees have consented,

that they be added as appellees before the United States Supreme Court.

ARGUMENT

At the outset several facts stand out. First, there is available to the voters of Colorado an often-used method for initiating constitutional amendments and statutes and submitting them to public referendum, wherein each voter of the state has equal voice with each other voter. The court below (p. 62) points out that in Colorado, by Colorado Constitution, Article V, Section 1, a constitutional amendment may be initiated by 8% of the legal voters and that no geographical distribution of petition signers is required. The reference is to the number of votes cast at the last general election for the Secretary of State. Thus, the percentage of *eligible* voters required to initiate a petition is much less than 8%. This provision is undoubtedly among the most liberal of its type in the nation in terms of the ease with which a measure may be placed on the ballot.* Secondly, the voters of Colorado overwhelmingly adopted the constitutional amendment which the appellants now attack. This approval was given by the urban areas as well as by the rural areas. Under Amendment 7 the urban areas of Colorado control both houses of the legislature, for as appellants admit (p. 17), the urban areas, under this amendment, control the Senate by a simple majority; and, of course, the voters in these areas also control the House of Representatives by a majority of approximately two to one. Third, appellants have not attacked any of the Findings of Fact by the court below which, operatively, go to the heterogeneous and diverse characteristics of the State of Colorado. Fourth, the essence of appellants' contentions

*Note: Appellants' constant reference to the reapportionment in Colorado as being in perpetuity cannot be accorded any weight when the existence of this frequently utilized remedy is recognized.

is that any method of apportionment which is not based upon a strict census of the population is *per se* invidiously discriminatory and violative of the equal protection clause of the Fourteenth Amendment.

Appellees submit that the decision in *Baker* v. *Carr*, 369 U.S. 186 (1962) did not go further than uphold the jurisdiction of Federal Courts, in the first instance, as to cases alleging deprivation of Federal constitutional rights. Where, as here, a full hearing reveals not only that there is a rational basis, in fact and opinion, for the action of the state, but further that there is no resulting urban-rural impasse, the Supreme Court of the United States should not entertain jurisdiction of an appeal. It being shown that the majority (in a general statewide election wherein all votes were counted equally) prefers to impose restraints on itself, pursuant to adopting a legislative structure thought best for the entire state, it is difficult to discern any reason for the Supreme Court to substitute its particular eclecticism for that of the voters. The Supreme Court has declined to take such action, in analogous situations, either on the ground of want of equity, as in *MacDougall* v. *Green*, 335 U.S. 285 (1948) and *American Federation of Labor* v. *Watson*, 327 U.S. 582 (1946), or on the ground of abstention, *Louisiana Power & Light Co.* v. *Thibodeaux*, 360 U.S. 25 (1959), *Martin* v. *Creasy*, 360 U.S. 219 (1962).

Appellees therefore respectfully submit that the appeal should be dismissed.

Appellees further submit that a rational departure from a strict population basis is permissible and is so clearly justified, as shown by the appendices to the Jurisdictional Statement, that further consideration need not be given to this matter, and the court may affirm forthwith.

Appellees do not intend to elaborate this argument beyond the most succinct statement because the cogent

opinion of the court below is the best presentation of the facts and the law.

The essence of the argument of appellants, that there can be no constitutional deviation from strict population apportionment, carries with it the corollary argument that where, as in Colorado, there are divergences in the interests of the populace in one portion of the state as compared to other portions of the state, such diverse interests may not be recognized and given an effective voice in the legislature. To carry the argument of appellants logically one step further is to say that a minority may be discriminated against by muting these other and important interests, and an invidious discrimination is perfectly proper so long as it is a minority, albeit an important minority, that is being discriminated against. To state this argument is to refute it.

This case is unusual insofar as considerations entering into apportionment are concerned. It is a case where the populace of the state as a whole has spoken almost currently with the issue here before the court and has clearly chosen a method of apportionment and representation which recognizes diverse interests and just as clearly refused a method of apportionment advocated by appellants. Unlike the situation obtaining in *Baker* v. *Carr*, *supra*, and in other cases before the court, the situation in Colorado is one in which there has been a frequent awareness of the problems of apportionment. Legislative revisions have occurred in 1881, 1891, 1901, 1909, 1913, 1953. Changes initiated by the people were adopted in 1932 and, of course, in 1962, by the adoption of Amendment No. 7. A referred proposal and an initiated proposal were rejected by the voters in 1954 and 1956 respectively. Further, as stated by the lower court (pp. 62, 63), the matter was under constant study and consideration by the people of the State of Colorado from 1956 until the adoption of the present amendment at

the election in 1962. Instead of a situation indicating no policy, Colorado illustrates a situation in which the people have evolved a thoroughly considered judgment as to the structure of their own government.

With the undisputed facts as they are, appellees respectfully submit that appellants present no question of such substantiality that this court's plenary consideration is called for. The judgment of the District Court should be affirmed.

Most respectfully submitted,

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